Christoph Hoelzl v Langkawi Island Resort Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6-23-88 OF 1990
MOHD NOOR AHMAD J
13 MARCH 1998

Labour Law *— Employment — Termination of employment — Constructive dismissal — Change in line of reporting — Whether functions and job of plaintiff as general manager remained intact — Whether plaintiff was constructively dismissed*

The plaintiff was employed by the defendant as the general manager for the defendant's hotel in Langkawi ('the hotel'). No job description was given but the plaintiff was required to manage and operate the hotel as a first class international resort. The plaintiff was to report to the defendant's board of directors based in Kuala Lumpur and to Pempena Consult, the management company appointed by the defendant. The plaintiff's immediate superior was the chairman of the executive committee of the defendant's board of directors. On 6 February 1990, the plaintiff was suspended from duty and a domestic inquiry was held wherein the allegations made against the defendant were dismissed. The plaintiff was reinstated to his former position vide a letter from the defendant dated 1 March 1990. Together with the said letter, the plaintiff was given a new job description of his work whereby, inter alia, the plaintiff was now required to report to the defendant's respresentative which was to be based in the hotel itself. The defendant's representative in turn would report to Kuala Lumpur. In addition, the plaintiff was required to refer to the defendant's representative for verification and concurrence with regards to payments, purchase orders and other contractual arrangements. The plaintiff indicated to the defendant that the same amounted to serious breaches of the plaintiff's contract. The plaintiff further requested that the said letter be withdrawn failing which the plaintiff would consider himself constructively dismissed. The defendant refused and by a letter dated 21 March 1990, the plaintiff considered himself dismissed with immediate effect. The plaintiff argued that the new job description and line of authority had the effect of taking away all the authority and powers of a general manager and leaving the plaintiff with merely all the responsibilities. The defendant contended that the status and function of the plaintiff was not changed in any manner but for the line of reporting and argued that in any event the plaintiff never had an unfettered hand in the running of the hotel nor any independent rights in respect of payments and purchase orders and other contractual arrangements. The issue was whether in all the circumstances of the case, the plaintiff was entitled to consider himself constructively dismissed.

Held, dismissing the appeal:

The new arrangement in the line of reporting merely had the effect of bringing the control by the management of the defendant from

Kuala Lumpur to Langkawi through the defendant's representative. The functions and job of the plaintiff as general manager remained intact and the new job description merely spelt out in detail the plaintiff's functions and responsibilities which could and should have been done at the commencement of the plaintiff's employment (see p 167I–168C).

Therefore, the defendant was not guilty of a breach going to the root of the contract. No doubt the plaintiff may have felt slighted by the new arrangement which may have affected the plaintiff's esteem amongst his fellow employees but this alone was insufficient to make a reasonable man feel frustrated to the extent that it became impossible to carry on being employed by an organization. Thus, the plaintiff was not entitled to consider himself dismissed (see p 168D–E); *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92, *Bouzourou v The Ottoman Bank* [1930] AC 271 and *Donovan v Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486 distinguished.

[Bahasa Malaysia summary

Plaintif telah diambil bekerja oleh defendan sebagai pengurus besar bagi hotel defendan di Langkawi ('hotel tersebut'). Penjelasan kerja tidak diberikan tetapi plaintif dikehendaki menguruskan dan mengendalikan hotel tersebut sebagai sebuah resort antarabangsa kelas pertama. Plaintif dikehendaki melapor kepada lembaga pengarah defendan yang bertempat di Kuala Lumpur dan kepada Pempena Consult, syarikat pengurusan yang telah dilantik oleh defendan. Orang atasan plaintif yang terdekat ialah pengerusi jawatankuasa eksekutif lembaga pengarah defendan. Pada 6 Februari 1990, plaintif telah digantung daripada tugasnya dan satu siasatan domestik telah dijalankan, di mana dakwaan-dakwaan yang dibuat terhadap plaintif telah ditolak. Plaintif telah ditempatkan semula kepada kedudukannya yang dahulu melalui surat daripada defendan bertarikh 1 Mac 1990. Bersama-sama surat tersebut, plaintif telah diberikan suatu penjelasan kerja yang baru mengenai kerja-kerjanya di mana, antara lainnya, plaintif adalah kini dikehendaki melapor kepada wakil defendan yang akan bertempat di hotel itu sendiri. Wakil defendan sebaliknya akan melapor ke Kuala Lumpur. Tambahan pula, plaintif telah dikehendaki merujuk kepada wakil defendan untuk penentusahan dan persetujuan berhubung dengan pembayaran-pembayaran, pesanan-pesanan belian dan persetujuan-persetujuan kontraktual yang lain. Plaintif telah menyatakan kepada defendan bahawa perkara itu membawa kepada kemungkiran yang serius akan kontrak plaintif. Plaintif selanjutnya meminta supaya surat tersebut ditarik-balik, kegagalan yang mana akan membuat plaintif menganggapkan di sini sebagai telah dipecat secara konstruktifnya. Defendan enggan dan melalui surat bertarikh 21 Mac 1990, plaintif menganggapkan dirinya telah diberhentikan dengan serta-merta. Plaintif berhujah bahawa penjelasan kerja yang baru dan garisan kuasa mempunyai kesan melucutkan segala kuasa

seseorang pengurus besar dan plaintif hanya mempunyai kesemua tanggungjawab semata-mata. Defendan menegaskan bahawa kedudukan dan fungsi plaintif telah tidak berubah dalam apa-apa cara sekali pun melainkan bagi perkara melapor dan berhujah bahawa dalam sebarang keadaan plaintif tidak pernah terlepas daripada belenggu dalam mengendalikan hotel tersebut dan tidak mempunyai sebarang hak bebas berhubung dengan pembayaran-pembayaran dan pesanan-pesanan belian dan persetujuan-persetujuan kontraktual yang lain. Isunya adalah sama ada dalam kesemua keadaan kes tersebut, plaintif adalah berhak untuk menganggapkan dirinya diberhentikan secara konstruktif.

Diputuskan, menolak rayuan:
Persetujuan baru mengenai pelaporan hanya mempunyai kesan pengawalan oleh pihak pengurusan defendan tersebut daripada Kuala Lumpur ke Langkawi melalui wakil defendan. Fungsi dan kerja plaintif sebagai pengurus besar kekal tidak disentuh dan penjelasan baru kerja hanya menyebut dengan terperinci fungsi dan tanggungjawab-tanggungjawab plaintif yang mana boleh dan seharusnya telah dilaksanakan di peringkat permulaan pekerjaan plaintif (lihat ms 167I–168C).

Dengan itu, defendan tidak bersalah atas kemungkiran jika dipandang pada dasar kontrak tersebut. Sungguhpun plaintif mungkin berasa tersinggung dengan persetujuan baru itu yang mana mungkin telah menjejaskan kehormatan plaintif di kalangan pekerja-pekerjanya, tetapi ini sahaja tidak memadai untuk membuat seseorang wang wajar berasa kecewa sehingga kepada had yang menjadikan mustahil baginya untuk terus berkhidmat dengan seseorang oprganisasi itu. Dengan itu, plaintif tidak berhak untuk menganggapkan dirinya sebagai telah diberhentikan (lihat ms 168D–E); *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92, *Bouzourou v The Ottoman Bank* [1930] AC 271 dan *Donovan v Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486 dibeza.]

Notes

For cases on termination of employment, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 790–835.

Cases referred to

Bouzourou v The Ottoman Bank [1930] AC 271 (distd)
Donovan v Invicta Airways Ltd [1970] 1 Lloyd's Rep 486 (distd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (distd)

Genii Seah Loo Gen (*Lobo & Associates*) for the plaintiff.
Robert Lazar (*Shearn Delamore & Co*) for the defendant.

Cur Adv Vult

Mohd Noor Ahmad J: The plaintiff claims, inter alia, damages for wrongful dismissal from employment.

Briefly, the undisputed facts are as follows.

The plaintiff was employed by the defendant as the general manager of its hotel for a fixed term of three years commencing from 16 July 1989. No written job description was given to him but he was primarily required to manage and operate the hotel as a first class international resort. As the general manager, he was to report to Pempena Consult (a management company appointed by the defendant) and the board of directors of the defendant. His immediate superior was the chairman of the executive committee of the defendant's board of directors and the defendant's board of directors at the material time.

Subsequently, the plaintiff was suspended from duty on 6 February 1990 and a domestic inquiry was held on 10 February 1990 in respect of certain allegations against him in which he attended. He was not found guilty of any of the allegations preferred against him. By letter of 1 March 1990 from the defendant, the plaintiff was reinstated to his former position with effect from 28 February 1990 and was required to report for duty not later than 5 March 1990. With the reinstatement letter, he was given a copy of new job description as the hotel general manager which superseded the earlier terms as contained in the letter of appointment relating to the requirement of reporting to Pempena Consult and the board of directors and of managing and operating the hotel as a first class international resort. At the same time, the defendant appointed and based its representative at the hotel premises ('the owner's representative') whose primary function was to oversee the operation of the hotel. The owner's representative was directly responsible to the executive committee of the board and was required to report to its chairman. The plaintiff as the general manager was required to refer to the owner's representative for concurrence and verification in respect of payments, purchase orders and letters of exchange or contracts operating supplies, etc entertainment and extension of complimentary rooms, etc leave and travelling, his claims or advances, press statements and other relevant matters. Under the new job description, amongst other duties the plaintiff was required to operate the hotel as a four-star international resort and was responsible for the day-to-day operations of the hotel. Through the owner's representative, he was responsible for the hotel's performance to the executive committee and the board. It was also stipulated that his job description might be amended by the executive committee from time to time.

On 6 March 1990, the plaintiff acknowledged the receipt of the reinstatement letter and intimated that he would collaborate with the owner's representative but he had to seek clarifications with the chairman of the executive committee on several points at least on the standard of the hotel. By letter of 7 March 1990, the chairman suggested to him to bring the matter up for clarification at the executive committee meeting to be

held in Kuala Lumpur on 30 March 1990. By fax of 9 March 1990, the plaintiff informed the chairman that he had to study the implications before he could sign the reinstatement letter and the new job description. On 13 March 1990, the plaintiff wrote to the chairman informing that he had studied the implications of the reinstatement letter and was of the view that its contents amounted to serious breaches of his contract and therefore, was unable to agree to it; and requested that the reinstatement letter and the letter of 7 March 1990 to be cancelled and withdrawn, failing which he had no alternative but to consider himself dismissed by the defendant with effect from the date of the reinstatement letter. However, the defendant by letter of 19 March 1990 refused to comply with the plaintiff's request and by letter of 21 March 1990 the plaintiff considered himself dismissed with immediate effect.

The plaintiff contended that the effect of the new job description would be that his reporting line was changed whereby he was asked to report to the owner's representative unlike before when he reported directly to the chairman of the executive committee of the board. His former job functions as general manager were taken away from him and given to the owner's representative and that under the new arrangement he had to refer to the owner's representative for any decision or transaction. And further, the defendant had also changed his earlier terms and conditions of employment by adding a clause in the new job description reserving the right of the executive vommittee to amend it from time to time where there was none before. In short, the plaintiff contended that all his authority and powers as general manager were taken away from him except the responsibility. As such, he had no choice but to consider himself dismissed.

On the other hand, the defendant asserted that the status and function of the plaintiff as general manager had not been changed in any way except the reporting line because previously the plaintiff had to report to Pempena Consult and the board of directors but now he had to go through the owner's representative. The plaintiff never had an unfettered and free hand in the operation of the hotel. Previously, the plaintiff never had any independent right in respect of payments, purchase orders and letters of exchange or contracts operating supplies, etc entertainment and extension of complimentary rooms, etc leave and travelling. He had to refer to Pempena Consult and the auditors for approval and verification in respect of those matters. However, under the new arrangement, he had to refer to the owner's representative instead. With regard to the clause reserving the right of the executive committee to amend the new job description from time to time, the defendant contended that it merely stipulated a prospective change and did not affect the plaintiff at the material time. In short, the defendant asserted that the reinstatement letter and the new job description did not in any way affect the foundation of the contract and neither was it indicative of the defendant's intention not to be bound by it.

A The issues before me are:

(1) whether the plaintiff was entitled to consider himself dismissed; and

(2) if the answer to (1) is in the affirmative, what is the quantum of damages?

B The common law recognizes the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer (see *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92). In the same case, the (then) C Supreme Court also decided that the word 'dismissal' in s 20 of the Industrial Relations Act 1967 should be interpreted with reference to the common law principle, viz:

> We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle. Thus, it would be a dismissal if an D employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v The Ottoman Bank* [1930] AC 271 and *Donovan v Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486).

E The question now is whether by the new arrangement as reflected in the reinstatement letter and the new job description, the defendant has been guilty of a breach which goes to the root of the contract or the defendant had evinced an intention no longer to be bound by it? To my mind, in a hotel venture like this which was to be operated as a first class or even a 4-star international resort, huge capital was required and that amount F must have been spent by the defendant. That being the case, surely the paramount interest of the defendant was to protect its investments. It is for this reason that Pempena Consult was appointed as the management company and that the plaintiff was required to report to it and the board of directors of the defendant and further the plaintiff was required to refer G to Pempena Consult and the auditors for approval and verification in respect of those important matters as mentioned in para 3(2) above. In other words, the plaintiff was not given a free hand to do whatever he liked in respect of those matters. As the general manager, he was only responsible for the day-to-day running of the hotel and he was to ensure that all employees continued their work in the normal course of business (see H para (a) of the memo dated 23 January 1990 at p 7 Ikatan B). To put it bluntly, he was merely a driver of the vehicle or a taikong of the vessel. On the facts, the reason for the implementation of the new arrangement by the defendant is understandable. The irresistible and reasonable inference would be that the defendant, not being satisfied with certain actions of the I plaintiff in the running of the hotel, as reflected in the allegations preferred against him in the domestic inquiry, had to introduce some changes in its control of the management of the hotel for no other purpose than to protect its investments. Hence, the new arrangement was introduced. The

fact that the domestic inquiry did not result in the plaintiff having been found guilty of any of the allegations preferred against him does not bar the defendant from making the changes because it was within its powers to do so. In my view, the new arrangement merely had the effect of bringing down the control by the management from Kuala Lumpur to Langkawi through the overseer (the owner's representative). The only change is only in the line of reporting. It does not in any way erode the functions of the plaintiff as the general manager as originally envisaged. His functions remained intact. It is rather unfortunate that there was no written job description as such at the inception of his employment. Be that as it may, on the documentary evidence gathered from Ikatan B, I am satisfied that the functions given to the owner's representative as spelt out in the job description are mainly concerned with the powers of management control which were originally vested in the defendant and that the new job description for the plaintiff in reality merely spells out in details the functions and the responsibilities of the general manager which ought to have been done or could have been done at the inception of the plaintiff's employment. With regard to the impugned clause in the new job descriptions, I am of the view that it does not detract from the original terms of employment which could have been spelt out at the inception of the employment had there been a written job description as the amendments are within the ambit of the functions and duties of the general manager.

Therefore, the defendant cannot be said to be guilty of a breach which goes to the root of the contract or had evinced an intention no longer to be bound by it. No doubt that the plaintiff might have felt slighted by the new arrangement because it affected the plaintiff's esteem amongst his fellow employees but that alone is not enough to frustrate a reasonable man or to make it impossible for a reasonable man to carry on being employed under the organization. Hence, the plaintiff is not entitled to consider himself dismissed. Therefore, the answer to issue (1) is in the negative.

The plaintiff's case has no parallel to the following cases because they are on the extreme. In *Wong Chee Hong*'s case, the employee was transferred from being the head of a department in a company to be a cinema manager. In *Bouzorou*'s case cited in *Wong Chee Hong*'s case, the employee was transferred to another province which rendered him exposed to an immediately threatening danger of violence or disease to his person. In *Donovan*'s case, also cited in *Wong Chee Hong*'s case, the employee (pilot) was asked by his superiors to fly the company's aircraft in such a way as to take on a wholly unjustified risk, putting the passengers at risk, for the sake of speed and economy.

As the answer to issue (1) is in the negative, I need not consider issue (2) in respect of items 1 and 2 in para 6 of the statement of claim.

Therefore, the plaintiff's claim is dismissed with costs except for items 3, 4 and 5 in para 6 of the statement of claim which add up to RM18,794.98 with interest at 8% pa until realization. He is entitled to these items because the services had been rendered and expenses incurred.

A With regard to the counterclaim, under the contract of employment, either party could terminate the contract by giving not less than three months' notice or paying three months' remuneration in lieu of notice. As the plaintiff had failed to do so, he is liable to pay the defendant the sum of RM33,000 as pleaded. The plaintiff admitted items (a), (c) and (d) of para 8 of the counterclaim which total up to RM2,700.84. Therefore, B judgment in the sum of RM35,700.84 is hereby entered against the plaintiff with costs.

Claim dismissed.

C Reported by Lew Chee Seong

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